In the matter of:

The interpretation of the Work Health and Safety Act 2011 (ACT)

JOINT OPINION

A. Background and overview

1. Our urgent advice is sought regarding the interpretation of the *Work Health and Safety 2011* (ACT) (**the Act**). Specifically, we are asked questions about whether and how the Act applies to the Legislative Assembly of the Australian Capital Territory.

2. The background facts are these. On 12 August 2022, a WorkSafe ACT inspector served a prohibition notice on the Speaker of the Legislative Assembly under s 195 of the Act. We are instructed that the impetus for the notice was a failure of the Legislative Assembly to comply with safety requirements concerning COVID-19. The first notice prohibited:

> "Undertaking any hearings or committee meetings at the Legislative Assembly of the Australian Capital Territory until a risk assessment has been undertaken, adequate control measures are implemented in line with the Hierarchy of Control, and consultation has been undertaking [sic] with all affected workers."

3. The ACT WorkSafe Commissioner (**the Commissioner)** cancelled the first notice on the morning of 15 August on the grounds that it was ambiguous as to whether it sought to prohibit all hearings and committee meetings, or only those conducted in person.

4. Shortly after and on that same day, a second prohibition notice was issued. The second notice prohibited "conducting committee hearings at the Legislative Assembly of the Australian Capital Territory, at which participants attend <u>in person</u> …" (emphasis added).

5. The Legislative Assembly has since passed a resolution establishing a Select Committee on Privileges to examine whether there has been a breach of the privileges

of the Legislative Assembly by the Commissioner or any other person. A public hearing is due to commence on 24 October 2022.

6. The Commissioner has been notified that her attendance is required at the hearing and has been provided with a copy of legal advice received by the Legislative Assembly from Mr Bret Walker SC and Mr Jackson Wherrett (**the advice**). That advice has also been published on the Committee's website.

7. It does not advise whether there has been a breach of privilege but addresses, as a matter of statutory construction, whether the Act empowered the inspectors to issue the prohibition notices to the Legislative Assembly. In short, the advice concludes:

   7.1. The Legislative Assembly is not a 'workplace' within the meaning of the Act;[1]

   7.2. Even if it is, Parliamentary debates and committee proceedings are not 'activities' within the meaning of the Act;[2]

   7.3. Therefore, an inspector has no power to issue a prohibition notice to the Legislative Assembly under the Act.

8. The authors' reasoning is based on the constitutional significance of the Legislative Assembly,[3] and a presumption that "if the Assembly had intended that it would be treated as a workplace in the same way as any other workplace that exists within the Territory, it is likely that intention would have been made more clear in the legislation."[4]

9. Although the scope of the advice is expressed to be limited to the application of the Act to the Legislative Assembly in the discharge of its constitutional functions,[5] the actual conclusions of the advice — particularly regarding the meaning of 'workplace' — extend the consequences of the advice well beyond those functions.

10. Against that background, we are asked to advise on essentially the same matters as the advice. As will be seen, we respectfully depart from it in important ways.

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1 The advice at [37].
2 The advice at [38].
3 The advice at [32]-[36].
4 The advice at [39].
5 The advice at [6].

11. By way of overview, in our opinion, narrowly construing the words of the Act by reference to the constitutional significance of the Legislative Assembly is the wrong approach. It is contrary to authority, and it has the effect of depriving Legislative Assembly staff — including caterers, cleaners and others whose work is removed from its constitutional functions — of the protections of the Act. We think the better approach is to construe the Act as broadly as it terms permit, which would necessarily mean it applies, on its face, to the Legislative Assembly.

12. There is, however, a potential principle of statutory interpretation (we say "potential" because its application in modern Australian law is far from clear) which holds that statutes should not be read to interfere with Parliamentary privilege absent clear words. That principle of statutory interpretation has recently been doubted by Courts in Canada and the United Kingdom and has never received the support of a majority of the High Court. In those circumstances, its place in Australian law rests on uncertain ground.

13. Absent that presumption, we think the Act in its terms and properly construed plainly empowers inspectors to issue notices to the Legislative Assembly. On the other hand, if the presumption were applied, the question would shift to the scope of the privilege. In our view, that might cover decisions about the manner and form of committee hearings. It clearly would not, however, extend to all areas of the Legislative Assembly's work including those areas that are removed from its constitutional functions. We consider, on balance, that the notice was validly issued. However, it must be acknowledged that the question is not free from doubt.

14. Our detailed reasons follow.

B. Statutory construction and the meaning of 'workplace'

15. The Act, like all statutes, is to be construed with regard to its text, read in light of its context and purpose. Context and purpose should be regarded at the first stage, not

only some later stage,[6] and where alternative constructions are available, the construction that would best achieve the purpose of the Act should be preferred.[7]

16. The objects of the Act are set out in s 3(1). They relevantly include "protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work …"[8]

17. Section 3(2) then provides:

> In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable.

18. In light of that statutory injunction and the beneficial purpose of the legislation,[9] courts have a "special responsibility to take account of and give effect to" the statutory purpose.[10] Longstanding authority — and the terms of s 3(2) — suggest that the provisions of the Act should be given a "fair, large and liberal" interpretation.[11]

19. We note the definition of 'workplace' in s 8 of the Act and the case law cited by the advice considering its meaning. Having regard to those matters, and absent considerations of the constitutional significance of Parliamentary privilege, in our opinion, the Legislative Assembly is plainly a 'workplace' within the meaning of the Act.

20. The question, it seems to us, actually turns on the more complicated questions surrounding the status of the Legislative Assembly and its privileges. Our advice focuses on those matters.

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6 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] (Kiefel CJ, Nettle and Gordon JJ).

7 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 375 [38]-[39] (Gageler J); Section 139 of the *Legislation Act 2001* (ACT).

8 Section 3(1)(a) of the Act.

9 See, *Waugh v Kippen (*1986) 160 CLR 156 at 164 (Gibbs CJ, Mason, Wilson and Dawson JJ).

10 *AB v Western Australia* (2011) 244 CLR 390 at 402 [24].

11 *AB v Western Australia* (2011) 244 CLR 390 at 402 [24], citing *IW v City of Perth* (1997) 191 CLR 1 at 12 (Brennan CJ and McHugh J), 39 (Gummow J), referring to *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333.

C. Statutory construction and Parliamentary privilege

21. The advice construes the Act, including the term 'workplace', in light of the broad constitutional significance of the Legislative Assembly. In our view, that approach is insufficiently precise. No authority is cited in its support, and it ultimately casts a wider net of exceptions than the terms and purposes of the Act permit.

22. There is, however, a significant body of case law — not cited in the advice — dealing with privileges concerning the 'exclusive cognisance' or 'internal affairs' of Parliament and the relationship between those privileges and the ordinary law. It is that line of authority that paves the path for the proper reasoning in this case.

23. The *Duke of Newcastle v Morris*[12] is frequently cited for the proposition that a Court will not read a statute to interfere with Parliamentary privilege absent unmistakeable or unambiguous words.

24. The rule of construction has been applied by the Queensland Court of Appeal,[13] and a single Justice of the Victorian Supreme Court.[14] It was mentioned (by way of a bare reference to the *Duke of Newcastle v Morris*) by Dawson J in *Baker v Campbell* — a case concerning legal professional privilege.[15] It remains the case though that the principle has never been considered — and therefore never supported — by a majority of the High Court.

25. The principle might be thought to be sufficiently closely related to a broader, settled principle of construction so as to support its existence in Australian law. That principle holds that statutes should not be interpreted to interfere with fundamental common law rights and principles in the absence of unmistakable and unambiguous language; that general words will rarely be sufficient.[16]

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12 (1870) LR 4 HL 661.

13 *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* (2001) 2 Qd R 8 at 23.

14 *Deborah Glass (in her capacity as Ombudsman for the State of Victoria) v President of the Legislative Council* [2016] VSC 507 at [26] (this aspect not considered on appeal).

15 (1983) 153 CLR 52 at 123.

16 *Baker v Campbell* (1983) 153 CLR 52 at 123 (Dawson J); *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Connor J). See further, Perry Herzfeld & Thomas Prince, *Interpretation* (LawBook Co, 2nd ed, 2020) at 195.

26. The rationale for that principle was explained in the following statement of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen*:[17]

> The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental right. Such an intention must be clearly manifested by unmistakeable and unambiguous language.

27. There may be good reasons to think that the broader principle would extend to Parliamentary privilege. Parliamentary privilege is without doubt a longstanding principle with a central role in our system of representative and responsible government.

28. However, there are equally good reasons to think that the High Court, given the chance, might decline to apply the presumption.

29. The suggestion that courts should presume Parliament does not intend to be bound by its own laws sits uncomfortably with the rule of law.[18] It sits out of step with modern community expectations of Members of Parliament, particularly when it comes to laws of a protective and beneficial character in the workplace.

30. That tension has recently led the courts in Canada and the United Kingdom to doubt the presumption.

31. *Canada (House of Commons) v Vaid*[19] was a 2005 case in which a former chauffeur of the Speaker of the House filed discrimination and harassments complaints against his former employer. One of the questions before the Court was whether the Canadian Human Rights Act applied to employees of Parliament. The House of Commons argued

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17 *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

18 See further, Joint Committee on Parliamentary Privilege (United Kingom), *Report* (18 June 2013) 'Exclusive cognisance and the rule of law' at [19], available at: https://publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/3004.htm#a5.

19 [2005] 1 RCS 667 ('**Vaid**').

that it did not because the "management of employees" fell within the internal affairs of Parliament and was therefore covered by Parliamentary privilege. The respondent, the Canadian Human Rights Commission, submitted that to the contrary that it was "unthinkable that Parliament would seek to deny its employees the benefit of labour and human rights protections which Parliament itself has imposed on every other federal employer".[20] Similar questions could, of course, be asked about the denial of safety protections for workers. Should it be presumed that Parliament intends to deprive its workers of protections from dangers at work — fire hazards? Asbestos? Sexual harassment? We think the best answer to those questions in modern Australia must be "no".

32. Justice Binnie, writing for the Court, observed that "there is much to be said for the respondents' view that Parliament should not be thought to intend to exempt its employees from access to human rights guarantees which Parliament itself has declared applicable to all "matters coming within the legislative authority of Parliament."[21] His Honour went on to observe: [22]

> The "presumption" suggested by Lord Hatherly 135 years ago is out of step with modern principles of statutory interpretation accepted in Canada … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

33. Five years later, the case of *R v Chaytor*[23] came before the Supreme Court of the United Kingdom. The main question was whether the exclusive cognisance of Parliament excluded from the Court's jurisdiction determination of criminal offences relating to parliamentary expenses. The Court held that it did not. In so holding, Lord Phillips observed that the presumption "is open to question."[24]

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20 *Vaid* at 675.
21 *Vaid* at 683.
22 *Vaid* at 713-714 citing Elmer A. Driedger, *Construction of Statutes* (2nd ed, 1983) at 87.
23 [2011] 1 AC 684 (**R v Chaytor**).
24 *R v Chaytor* at 716 [78] (Lord Phillips).

34. Against that background, there is plainly an open question as to the approach that would be taken by the High Court.

35. If the presumption does not apply, there is, in our view, no principle of legal reason to compel the conclusion that Parliament did not intend to bind itself by the Act, and consequently, no reason to doubt the validity of the prohibition notices.

36. If, on the other hand, the presumption does apply, the question will likely turn primarily on the scope of the privilege.[25]

E. The scope of Parliamentary privilege

37. Parliamentary privileges — the particulars rights, powers and immunities of Parliament — evolved in England over several centuries of parliamentary practice. The existence of the privileges was recognised by courts and had become part of the English common law by the 19th century, when the first Australian parliaments were established.[26]

38. In the ACT, parliamentary privilege derives from statute.[27] Section 24 of the *Self-Government Act 1988* (Cth) (**Self-Government Act**) provides as follows:

> **24 Powers, privileges and immunities of Assembly**
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> (1) In this section:
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> ***powers*** includes privileges and immunities, but does not include legislative powers.
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> (2) Without limiting the generality of section 22, the Assembly may also make laws:
>
> (a) declaring the powers of the Assembly and of its members and committees, but so that the powers so declared do not exceed the

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25 Noting there are no express words binding Parliament. We do not preclude the possibility that a contrary intent might be found, but we consider that the ultimate question is much more likely to turn on the scope of the privilege. For that reason, we focus on that question.

26 See further, Peter Hanks, Frances Gordon & Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2018) at 105; The Hon Alan Blow AO, Chief Justice of Tasmania, *Parliamentary Sovereignty: a Law Unto Itself*, Speech delivered at a seminar held by the Australian and New Zealand Associations of Clerks-At-The-Table (22 January 2019).

27 See further, Enid Campbell, *Parliamentary Privilege* (The Federation Press, 2nd ed, 2003) at 3; David Mossop, Justice of the Supreme Court of the ACT, *The Constitution of the Australian Capital Territory* (The Federation Press, 2021) at 99-101.

powers for the time being of the House of Representatives or of its members or committees; and

(b) providing for the manner in which powers so declared may be exercised or upheld.

(3) Until the Assembly makes a law with respect to its powers, the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives and its members and committees.

(4) Nothing in this section empowers the Assembly to imprison or fine a person.

39. The ACT has passed no such law, and so the privileges of the Legislative Assembly are co-extensive with the privileges of the House of Representatives, its members and committees.

40. The privileges of the Commonwealth Houses of Parliament derive from s 49 of the *Constitution* and the *Parliamentary Privileges Act 1987* (Cth) (**Parliamentary Privileges Act).**

41. Section 49 of the *Constitution* provides:

> The powers, privileges, and immunities of the Senate and the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of the Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

42. The Parliamentary Privileges Act continues to reflect the privileges effected by s 49 except to the extent that the Act expressly or otherwise provides.[28]

43. The end result is that the privileges of the ACT Legislative Assembly are essentially (and sufficiently for present purposes) co-extensive with the privileges of the House of Commons as at federation.

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[28] Section 5 of the *Parliamentary Privileges Act*.

44. It is well recognised that Parliamentary privilege includes 'exclusive cognisance' or the exclusive ability of the Houses of Parliament to control their own internal affairs.[29] However, the scope of that privilege has been subject to much controversy, particularly as it applies to cases where the Houses are effectively shielded from the law of the land.

45. In 1935 in *R v Graham-Campbell, Ex p Herbert*,[30] it was held that the sale of liquor without a licence in the Precincts of the House of Commons fell within the scope of the internal affairs of the House, and therefore, within the privileges of the House, so that no court of law had jurisdiction to intervene.

46. That decision has since been heavily criticised and doubted.[31] We share that doubt and agree with the criticisms.

47. In Australia, it has been distinguished in cases concerning employees on the basis that the sale of liquor in the House of Commons concerns only the Members of Parliament and their guests, whereas employment laws regulate the relationship between the members and 'strangers'.

48. On that basis, in 1981, the South Australian Industrial Court in *Bear v South Australia*[32] held that a waitress who injured her knee whilst working at Parliament House was able to obtain workers' compensation. In *R v Chaytor*, Lord Phillips expressed the view that the reasoning of this case "is likely to be followed."[33]

49. The South Australian Industrial Relations Court more recently considered a similar claim in *President of the Legislative Council (SA) v Kosmas*.[34] There, the question was whether the Court could hear a claim for underpayment of overtime in respect of an employee engaged as a secretary to the Legislative Review Committee. The Court ultimately held that Parliamentary privilege applied to exclude its jurisdiction. But it decided the case on the basis that privilege extends only to employment activity that

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29 See further, Enid Campbell, *Parliamentary Privilege* (The Federation Press, 2nd ed, 2003) Chapter 11; *R v Chaytor* at 712-716 (Lord Phillips).

30 [1935] 1 KB 594.

31 See, *Vaid* at 707-708 and the materials there cited.

32 (1981) 48 SAIR 604 at 622.

33 *R v Chaytor* at 715.

34 [2008] SAIRC 41 (**'Kosmas'**).

is "so closely and directly connected with the fulfilment by the Parliament or its members of their functions as a legislative and deliberative body that outside interference would undermine the level of autonomy required to enable the Parliament and its members to do their legislative work with dignity and efficiency."[35] That is, the decision was based on the specific role of Mr Kosmas, and its relationship to core parliamentary business.

50. Whether the case was correctly decided or not (we would venture to say it was not), it plainly does not stand for the proposition that the entire workplace of the Legislative Assembly falls within the scope of parliamentary privilege.

51. Based on the foregoing authorities, and the approach adopted in the United Kingdom and Canada, we are confident that parliamentary privilege would not be held to extend to the entire workplace of the Legislative Assembly. In particular, we consider that *R v Graham-Campbell, Ex p Herbert* was wrongly decided and is, in any event, distinguishable.

52. For the avoidance of any doubt, we also draw attention to Chapter 2 of Odgers' Australian Senate Practice, which refers to the "confused" idea that the ordinary law did not apply in the Parliamentary Precincts.[36] That "confused" thinking is, in our opinion, not far removed from the notion that the Legislative Assembly cannot be a 'workplace.'

53. Whether parliamentary privilege extends to decisions about the manner in which the Legislative Assembly holds its hearings (i.e., in person or online) is a more finely balanced question. A reasonable argument could be made that given the relationship between parliamentary sovereignty and parliamentary privilege, the autonomy of Parliament to decide the manner in which it holds its hearings falls within the scope of the privilege.

54. On the other hand, it can be argued that the second notice in particular did not, on proper analysis, interfere with the privilege because it simply directed the manner in

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35 *Kosmas* at [40].

36 Odger's Australian Senate Practice (14th ed), Chapter 2 'Parliamentary precincts' available at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_02#h06.

which the hearings were to be heard, but did not prevent them from occurring or seek to intervene in their content or conclusions. Online hearings are authorised by the Parliament itself and so it can hardly be said that to do so interferes – in a real sense – with the exercise of the proper functions of the Parliament.

55. On balance, we consider that the second notice did not breach privilege, but the matter cannot be said to be clear.

F. Consequences — a question for the courts?

56. Based on the advice to this point, it will be clear that, in our view, there is doubt attending the question of whether the notices were validly issued.

57. In particular, the question is significantly underpinned by the existence (or not) of a presumption against interference with parliamentary privilege. That position is far from settled.

58. Longstanding authority indicates that it is for the courts to determine the existence of a privilege, and for Parliament to determine the manner of its exercise.[37] Although a House of Parliament can try a contempt, it cannot determine for itself the existence of a privilege; no resolution of a House can change the law.[38]

59. Parliamentary privilege in the ACT is a creature of statute. In circumstances where a later statute has, at the very least arguably, empowered an inspector to issue the notice, it is far from clear that the privilege the Legislative Assembly claims continues in force.[39] A question of law is raised about whether the Legislative Assembly, in empowering the inspectors to issue the notices, altered its own privileges.

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37 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ).

38 See further, Joint Committee on Parliamentary Privilege (United Kingom), *Report* (18 June 2013) 'The role of statute' available at: https://publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/3004.htm#a8.

39 We note that the Federal nature of the Self-Government Act might give rise to arguments that any statutory interference with the privileges of the ACT Legislative Assembly will be invalid to the extent of the inconsistency by reason of s 109 of the *Constitution*. The argument could equally be made, of course, that the conferral of power to determine privileges includes the power to override them. No such issues were raised in the advice, and we do not purport to comprehensively explore or answer them here, given the time frames. We do, however, consider that the potential arguments serve only to reinforce our strong view that these questions ought to be determined by a court.

60. In those circumstances, we consider that the proper approach, consistent with longstanding authority and the separation of powers, is to bring the question before the courts — not to in effect try the question of statutory construction before the Legislative Assembly under the guise of a contempt trial. Indeed, if the Legislative Assembly seeks to do so, it would be acting contrary to basic principles underpinning the separation of powers.

61. The question should properly be brought in the ACT Supreme Court by application by the Legislative Assembly for judicial review of the second notice, or by proceedings in the same court for a declaration.

62. We recommend that this course be urged upon the Legislative Assembly.

20 October 2022

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